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DOCKET NO.

**FILED/ACCEPTED**

MAR - 5 2007

**Federal Communications Commission  
Office of the Secretary**

**PETITION FOR DECLARATORY RULING AND PREEMPTION**

Benjamin H. Dickens, Jr.  
Mary J. Sisak  
BLOOSTON, MORDKOFKY, DICKENS,  
DUFFY & PRENDERGAST, LLP  
2120 L Street, NW, Suite 300  
Washington, D.C. 20037

Brook Bennett Brown  
MCGINNIS, LOCHRIDGE & KILGORE, L.L.P.  
600 Congress Avenue, Suite 2100  
Austin, Texas 78701

## COUNSEL FOR PETITIONERS

March 5, 2007

No. of Copies rec'd 0+2  
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## **TABLE OF CONTENTS**

|      |                                                                                                                                                        |    |
|------|--------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| I.   | Summary of Requested Relief .....                                                                                                                      | 4  |
| II.  | Background .....                                                                                                                                       | 7  |
| III. | Section 214(e) of the Act limits federal high cost universal service<br>funds to carriers that meet the facilities requirement of Section 214(e). .... | 11 |
| IV.  | The PUTC's Order must be preempted .....                                                                                                               | 18 |
| V.   | Conclusion .....                                                                                                                                       | 19 |



equipment used in conjunction with resold fixed or mobile satellite service is not a facility-based carrier and is ineligible for high cost universal service support.<sup>3</sup>

Petitioners also seek an order preempting the Public Utility Commission of Texas ("PUCT") order designating DialToneServices, L.P. ("DTS") as an eligible telecommunications carrier ("ETC") for high cost universal service support.<sup>4</sup> The PUCT order designates DTS as a facility-based carrier on the basis of its provision of satellite customer equipment in conjunction with resold satellite service. Because DTS does not meet the facilities requirement of Section 214(e) of the Act, as defined in the Commission's Universal Service Order and rules, the PUCT order violates the facilities requirement of Section 214(e) of the Act and must be preempted.

#### **I. SUMMARY OF REQUESTED RELIEF**

High cost universal service support is intended to provide a long-term, sustainable increase in the availability of telecommunications services at reasonable rates in high cost, rural areas in a competitively neutral manner. In Section 214(e) of the Act, Congress has limited high cost universal service support to carriers that provide the supported services in whole or in part over their own facilities, thereby ensuring that high cost universal service support enhances the provision of facilities in the high cost areas for which the monies are targeted. To accomplish this objective, Section 214(e) requires a carrier to offer the supported services using either "its

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<sup>3</sup> "High cost universal service support" as used herein refers to the support available under Section 214(e) of the Act as defined in Part 54, Subparts B, C, and D of the Commission's rules. As defined in 47 C.F.R. § 54.201 of the Commission's rules, this support is the "universal service support distributed pursuant to part 36 and part 69 of this chapter and subparts D and E of this part [part 54]."

<sup>4</sup> Docket No. 32024, Application of DialToneServices, L.P., to Amend its Designation as an Eligible Telecommunications Carrier (ETC) and an Eligible Telecommunications Provider (ETP) in Certain Rural Telephone Companies, Order, dated June 22, 2006. See Exhibit A, attached hereto. The PUCT denied Petitioners' Motion for Rehearing challenging the Order and, on August 4, 2006, issued a letter notifying this Commission and the Universal Service Administrative Company of its determination that DTS is an eligible telecommunications carrier for the service areas served by Petitioners. See Exhibit B, attached hereto.

own facilities or a combination of its own facilities and resale of another carrier's services" as a condition of eligibility for high cost universal service support.<sup>5</sup>

The Commission's Universal Service Order<sup>6</sup> further defines the facilities requirement, concluding that a carrier must show that it owns network facilities used in the "transmission or routing" of at least one of the nine federally supported USF services to be eligible for high cost universal service support.<sup>7</sup> The Universal Service Order also concludes that resale carriers are ineligible for high cost universal service support.<sup>8</sup> Thus, only a carrier that owns network transmission or routing facilities used to provide one of the nine services is eligible for high cost universal service support. The Commission's rules also expressly prohibit a state commission from designating as an eligible telecommunications carrier a carrier that offers the services supported by federal universal service support mechanisms exclusively through the resale of another carrier's services.<sup>9</sup>

The PUCT order permits DTS, a reseller of satellite service providing only satellite customer equipment, to receive high cost universal service support in violation of the facilities requirement of Section 214(e). Because DTS owns no network transmission and routing facilities, but provides supported services wholly through resale of Globalstar USA satellite

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<sup>5</sup> 47 U.S.C. § 214(e)(1)(A); 47 C.F.R. §§ 54.201(d)(1) and 54.201(e).

<sup>6</sup> *Federal State Board on Universal Service*, CC Docket No. 96045, FCC 97-157, Report and Order (May 8, 1997) 12 FCC Rcd 8776 ("Universal Service Order").

<sup>7</sup> *Id.* at ¶ 151: "We interpret the term 'facilities' for purposes of section 241(e), to mean any physical components of the telecommunications network that are used in the transmission or routing of the services designated for support under section 254(c)(1)." *See also* 47 C.F.R. § 54.201(e). The nine designated services are listed in 47 C.F.R. § 54.101(a)(1)-(9).

<sup>8</sup> *Id.* at ¶ 152.

<sup>9</sup> 47 C.F.R. § 54.201(i): "A state commission *shall not* designate as an eligible telecommunications carrier a telecommunications carrier that offers the services supported by federal universal service support mechanisms exclusively through resale of another carrier's services." (Emphasis supplied.)

service, the PUCT order designating DTS as eligible for federal high cost universal service support violates the facilities requirement of Section 214(e) of the Act, the Universal Service Order and the Commission's rules defining "facilities" for purposes of high cost universal service support.

By allowing a reseller of satellite customer equipment to receive high cost universal service funds, the PUCT order threatens the stability of the federal universal service fund. Its rationale would enable any dealer/vendor of satellite or wireless mobile service handsets or fixed service antennas, to receive high cost universal service funds. The PUCT order also creates competitive inequality. It allows DTS to receive high cost universal service support even though DTS provides only deregulated, non-tariffed customer equipment, when other carriers, like Petitioners, receive no support with respect to their customers' CPE costs.

The Commission is charged with interpreting and enforcing the statutory requirements for federal universal service support. Because the PUCT's order violates the Act, creates confusion and inequity in light of the Commission's Universal Service Order, rules, and related orders declining to extend high cost universal service support to wireless customer equipment, threatens the stability of the universal service fund and creates competitive inequality, Petitioners ask the Commission to issue the following declarations:

- Mobile handsets and car-top mobile antennas used with mobile satellite service are not network transmission and routing facilities eligible for high cost universal service support as defined by Section 214(e) of the Act.
- Rooftop or pole-mounted antennas and the associated wiring used with fixed satellite service are not network transmission and routing facilities eligible for high cost universal service support as defined by Section 214(e) of the Act.
- The PUCT order designating DialToneServices, L.P, as eligible for federal high cost universal service support on the basis of its provision of satellite customer equipment violates Section 214(e) of the Act, the Universal Service Order, and the Commission's rules and, therefore, is preempted.

## **II. BACKGROUND**

On November 9, 2005, DTS filed an application with the PUCT seeking designation as an eligible telecommunications carrier for federal high cost universal service support within the individual Petitioners' study areas.<sup>10</sup> To meet the facilities requirement, DTS alleged in its application that it would provide satellite service "in partnership with Globalstar USA,"<sup>11</sup> utilizing "its own fixed satellite earth stations,"<sup>12</sup> and that it would construct "antenna towers."<sup>13</sup>

In addition, in an amendment to its application, DTS filed a document titled "Summary of Facilities," describing the roof-mounted antenna DTS uses in conjunction with fixed satellite service and its installation.<sup>14</sup> In the proceeding before the PUCT, DTS claimed that by providing the antenna, also called by DTS a "transmitter/receiver unit" or "fixed satellite earth station," and the associated installation hardware (wires, mounts, poles, offset brackets, network interface box, grounding equipment, lightening rod, towers and other equipment),<sup>15</sup> DTS qualifies as a facility-based provider of a supported service and, therefore, is eligible for designation for high cost universal service support.

For its fixed satellite service, DTS installs an antenna (transceiver) on the customer's roof or on a pole adjacent to a customer's home and extends a wire from the antenna to the

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<sup>10</sup> A copy of DTS's application before the PUCT is attached as Exhibit C.

<sup>11</sup> Exhibit C, p. 2: "DialToneServices, L.P. is a provider of Mobile Satellite Service in partnership with GlobalStar USA."

<sup>12</sup> *Id.* at p. 5, ¶ E: "DTS will utilize its own fixed earth stations that receive and transmit messages."

<sup>13</sup> *Id.* at p. 6: "In addition, under certain circumstances, DTS will construct antenna towers to support customer service."

<sup>14</sup> See Exhibit D, which is a copy of the "Summary of Facilities" as filed with the PUCT. The first two pages of this document are a narrative prepared by DTS. The remaining pages of the "Summary of Facilities" are identical to pages on the Globalstar USA website, and describe how a customer is to install the antenna.

<sup>15</sup> All of this equipment is equipment that a Globalstar service customer may purchase directly from Globalstar and self-install. See Globalstar USA website at [www.globalstarusa.com/en/products/prod\\_display.php?id=3&target=Tab4](http://www.globalstarusa.com/en/products/prod_display.php?id=3&target=Tab4) and click on "FAU-200 Installation Guide," a copy of which is provided as Exhibit E.

demarcation point ("NID") for the wiring to the customer's telephones within the house.<sup>16</sup> The customer then subscribes to resold Globalstar satellite service. DTS claims to own only the facilities on the customer side of the roof-top antenna. The facilities on the network (satellite) side of the antenna are provided by Globalstar or other vendors.<sup>17</sup>

For its mobile service, DTS provides the mobile handset and related accessories in conjunction with resold Globalstar satellite service.<sup>18</sup>

In the evidence presented at the PUCT hearing, DTS admitted that it "obtains the satellite connectivity portion of the services DTS provides to end use customers from Globalstar USA LLC."<sup>19</sup> DTS also admitted that the "fixed satellite earth stations" it claims to own are the roof-top antennas at the customer's house,<sup>20</sup> and that these antennas are "customers' terminal equipment on the end user side of the communication path."<sup>21</sup> DTS also admitted that it provides only "its customers' terminal equipment on the end user side of the communications path,"<sup>22</sup> with the services themselves licensed to Globalstar.<sup>23</sup> All carrier codes associated with

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<sup>16</sup> See Exhibit F, which is a certified copy of the transcript of the evidentiary hearing before the PUCT, at Tr. p. 103, lns. 9-22.

<sup>17</sup> See Exhibit G, DTS response to Request for Information No. 3-1. DTS witness Dorran agreed that "everything" on the network side of the customer's antenna is provided by a vendor other than DTS. (Exhibit F, Tr. p. 79, ln. 13 to p. 80, ln. 8.) This document is contained in the PUCT record as Intervenors' Exhibit 5, p. 46.

<sup>18</sup> See Exhibit F, Tr. p. 106, ln. 10 to p. 107, ln. 20.

<sup>19</sup> See Exhibit H, DTS response to Request for Information No. 1-7. This document is contained in the PUCT record as Intervenors' Ex. 5, p. 3.

<sup>20</sup> Exhibit F, Tr. p. 80, ln. 20 to p. 81, ln. 4.

<sup>21</sup> Exhibit I, DTS response to Request for Information No. 1-1. This document is contained in the PUCT record as Intervenors' Ex. 5, p. 1.

<sup>22</sup> *Id.*, Exhibit I, DTS response to Request for Information No. 1-1: "The mobile satellite service licenses utilized by DTS for the provision of service are issued to Globalstar or one of its affiliates rather than DTS.... DTS provides to its customers terminal equipment on the end user side of the communication path."

<sup>23</sup> *Id.*



traffic originated by or terminated to DTS customers are held by Globalstar.<sup>24</sup> The record also shows that the installation of this customer satellite equipment is not done by DTS, but instead, DTS contracts with local wireless service retailers or satellite TV retailers to install and service its customers' mobile units and fixed service antennas.<sup>25</sup>

In finding DTS eligible for designation as an ETC, the PUCT order fails to determine whether the satellite customer equipment DTS provides is network transmission or routing facilities as defined by Section 214(e) and the Commission's orders. The PUCT's two findings with regard to the facilities ownership issue are:

- Finding of Fact No. 18: "DTS will use *MSS [mobile satellite service]* obtained through Globalstar USA *in addition to other facilities owned by DTS* and thus meets the requirement of using either its own facilities or a combination of its own facilities and resale of another carrier's services."<sup>26</sup>
- Finding of Fact No. 25: "DTS will use universal service funds to obtain *full satellite connectivity* and provide *all additional network facilities (wire, mounts, poles, offset brackets, network interface boxes, grounding equipment, lightning rods, towers and other equipment)* for the areas it serves."<sup>27</sup>

The PUCT's first finding, Finding of Fact 18, states that DTS will "use MSS service obtained through Globalstar" in addition to "other facilities owned by DTS." The use of Globalstar's service does not support designation because DTS's "use" of Globalstar's service is by resale, which does not qualify as facilities ownership. The PUCT expressly declines to find DTS's agreement with Globalstar to be a UNE-type agreement.<sup>28</sup> Thus, the order cannot be

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<sup>24</sup> See Exhibit J, DTS response to Request for Information No. 1-53. This document is contained in the PUCT record as Intervenor's Ex. 5, pp. 42-43.

<sup>25</sup> See Exhibit F, Tr. p. 75, ln. 8 to p. 77, ln. 5.

<sup>26</sup> Exhibit A, p. 4 of 11, Finding of Fact 18 (emphasis supplied).

<sup>27</sup> Exhibit A, p. 5 of 11, Finding of Fact 25 (emphasis supplied).

<sup>28</sup> See Exhibit K, Proposal for Decision, at p. 8, identifying the question whether DTS's contract with Globalstar is a UNE-type contract, and at p. 10, stating that it is "unnecessary to determine this issue." The Proposal for Decision is adopted by the PUCT order except where expressly modified or rejected. (Exhibit A at p. 1.) The Order makes

supported on the rationale that DTS owns network transmission or switching facilities by virtue of its resale of GlobalStar USA services.

The second component of Finding of Fact 18, "other facilities owned by DTS," is likewise inadequate to support DTS's designation. The only "other facilities owned by DTS" are the equipment associated with installing the fixed-service rooftop antennas, i.e., the wire, mounts, poles, offset brackets, network interface boxes, grounding equipment, lightning rods, towers referred to in the second PUCT finding, Finding of Fact 25. On cross-examination, DTS admitted that this equipment is located entirely on *the customer side* of the customer's antenna.<sup>29</sup> As shown in the Commission orders discussed below, the customer premise antenna and associated mounting hardware and wiring are not network transmission or routing facilities.

Further, the "wire, mounts, poles, offset brackets, network interface boxes, grounding equipment, lightening rods, towers or other equipment" listed in Finding of Fact 25 are used only in DTS's provision of fixed service.<sup>30</sup> Thus, even if such equipment were network transmission or routing facilities, such equipment is not used in its provision of DTS's mobile satellite services and cannot support designation of DTS as a facility-based carrier of mobile satellite service.

The only remaining component of the PUCT's two findings is the phrase "full satellite connectivity" in Finding of Fact 25. This phrase is taken from DTS's application. When asked what he meant by "full satellite connectivity," DTS's president stated it meant DTS's "purchase

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no modification or rejection of this portion of the Proposal for Decision. In addition, review of DTS's GlobalStar agreement disproves it to be a UNE-type agreement. This DTS/Globalstar agreement is contained within the PUCT record as Intervenor's Exhibit 1, but is not attached to this petition because DTS claims the agreement to be confidential.

<sup>29</sup> Exhibit F, Tr. p.78, ln. 10 to p. 81, ln. 4.

<sup>30</sup> Exhibit F, Tr. p. 106 ln. 14 to p. 107, ln. 20.

and installation of customer ground facilities necessary to make and receive phone calls over the Globalstar satellite.”<sup>31</sup> Consequently, “full satellite connectivity” does not denote any network facilities for transmission and routing of supported services, but only the same customer roof-top antenna and mobile handsets discussed above.

**III. SECTION 214(e) OF THE ACT LIMITS FEDERAL HIGH COST UNIVERSAL SERVICE FUNDS TO CARRIERS THAT MEET THE FACILITIES REQUIREMENT OF SECTION 214(e).**

Section 214(e) of the Act limits federal high cost universal service support to a carrier that provides supported services “using its own facilities or a combination of its own facilities and resale of another carrier’s services.”<sup>32</sup> The FCC’s Universal Service Order further defines the facilities requirement of Section 214(e), to limit universal service funding to the support of *network costs*, stating: “We interpret the term ‘facilities,’ for purposes of Section 214(e), to mean any *physical components of the telecommunications network that are used in the transmission or routing of the services designated for support under Section 254(c)(1)*.”<sup>33</sup> In the footnote to this sentence, the FCC clarifies further: “For example, we would include within this definition: local loops, switches, transmission systems, and network control systems.” (*Id.* at n.380.) The Order further states, at ¶ 152: “By encompassing *only physical components of the telecommunications network that are used to transmit or route the supported services*, this definition, in effect, excludes from eligibility a ‘pure’ reseller that claims to satisfy the facilities requirement by providing facilities through its own billing office or through some other facility that is not a ‘physical component’ of the network, as defined in this order.”

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<sup>31</sup> See Exhibit L, DTS response to Request for Information No. 2-4. This document is contained in the PUCT record as Intervenor’s Ex. 5, p. 44.

<sup>32</sup> 47 U.S.C. § 214(e)(1)(A).

<sup>33</sup> Universal Service Order at ¶ 151 (emphasis supplied).

DTS does not own any component of the Globalstar network over which its resold services are provided. Because DTS's "use" of the Globalstar network is by resale of Globalstar services, such use cannot support eligibility for universal service support under Section 214(e).

For mobile service, the only equipment DTS provides is the mobile handset and perhaps a car-top antenna or other handset accessories.<sup>34</sup> Similarly, for fixed service, the only "facility" DTS provides is the customer premise roof- or pole-mounted antenna and associated hardware and wiring. The following orders confirm that this satellite customer equipment is not network transmission and routing facilities, and therefore its provision does not qualify DTS as a facility-based carrier eligible for universal service support.

In a series of orders subsequent to the Universal Service Order, the Commission has determined that wireless handsets and associated antennas are customer premise equipment and therefore ineligible for universal service support. *See Twelfth Report and Order* in Docket 96-45,<sup>35</sup> as modified on rehearing in the *Tribal Lands Order*.<sup>36</sup> In the *Twelfth Report and Order*, the Commission concluded that wireless mobile handsets are "equipment that falls on the customer side of the network interface device boundary between customer and network facilities," and, therefore, ineligible for universal service support.<sup>37</sup> The order excludes this

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<sup>34</sup> Exhibit F, Tr. pp. 106-08.

<sup>35</sup> *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas Including Tribal and Insular Areas*, CC Docket 96-45, *Twelfth Report and Order*, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, FCC 00-208, 15 FCC Rcd. 12,208 (June 30, 2000) ("*Twelfth Report and Order*") at ¶¶ 61-63.

<sup>36</sup> *In re Federal-State Joint Board on Universal Service, Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, Commonwealth of Northern Mariana Islands*, FCC 03-115, Twenty-Fifth Order on Reconsideration, Report and Order, and Further Notice of Proposed Rulemaking, 18 FCCR Rcd. 10,928, 2003 WL 21195264 (2003) ("*Tribal Lands Order*").

<sup>37</sup> *Twelfth Report and Order* at ¶ 61. *See also Tribal Lands Order*, ¶ 18, where the Commission concludes that "Although the Commission has never defined a demarcation point for wireless service, it has generally treated wireless handsets for purposes of bundled marketing of equipment and services as Customer Premises Equipment (CPE), which is equipment that falls on the customer side of the demarcation point between customer and network facilities." (Footnote omitted)

equipment from universal service support because “federal universal service mechanisms generally support only the cost of facilities falling on the network side of the demarcation point,” and because “the Commission’s definition of supported services does not include customer premise equipment or inside wiring.”<sup>38</sup>

In this order, the Commission held open the possibility that wireless antennas (or “receivers”) might be considered as network facilities if the costs associated with the antenna could be clearly identified: “To the extent that a non-wireline carrier can isolate costs associated with the portion of a handset that receives wireless signals, we conclude that those costs would be covered as costs on the network side of the network interface device.”<sup>39</sup> However, in the subsequent *Tribal Lands Order*, the Commission reconsidered the treatment of the antenna component of the wireless handset, and concluded that such equipment did not qualify for support, on two grounds. While noting that it had never defined a demarcation point for wireless service, the Commission concluded that it has generally treated wireless handsets as CPE, which falls on the customer’s side of the demarcation point, for purposes of bundled marketing or equipment and services.<sup>40</sup> The Commission also noted that its decision was also based on the difficulty in identifying “what portion, if any, of a wireless handset is on the network side of the demarcation point....”<sup>41</sup> Under the *Tribal Lands Order*, the mobile handsets and antennas DTS provides are clearly not network transmission and routing facilities, but customer premise equipment.

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<sup>38</sup> *Twelfth Report and Order* at ¶ 61.

<sup>39</sup> *Id.*

<sup>40</sup> *Tribal Lands Order* at ¶ 18.

<sup>41</sup> *Id.*

With respect to rooftop antennas used in providing fixed wireless services, the *Tribal Lands Order* states: “[I]f a fixed wireless service requires the installation of a receiver on a rooftop, for example, to bring service to a demarcation point, *expanded Link-Up support* could be used to offset *the cost of installing such facilities*,”<sup>42</sup> citing Paragraph 61 of the *Twelfth Report and Order*, which states that rooftop wireless antennas may be eligible for Expanded Link-Up Support as “facilities that are necessary to enable a non-wireline eligible telecommunications carrier to provide service to the demarcation point.”<sup>43</sup> Expanded Link-Up Support is defined in Part 54.411(a)(3) of the Commission’s rules as support for “charges assessed for commencing telecommunications service,” including “facilities-based charges associated with the extension of lines or construction of facilities needed to initiate service.” Thus, costs of installing a rooftop antenna to bring a wireless signal to the point of demarcation may be recoverable as a one-time charge under the Link-Up program. However, these same costs cannot simultaneously be network transmission or routing facilities for which monthly per-line high cost assistance is available.

In reaching this conclusion, the *Tribal Lands Order* cites an earlier order addressing the bundling of cellular customer premise equipment (“CPE”) with cellular service,<sup>44</sup> in which the FCC recounts that from the outset of its availability, consistent with its *Computer II Order* deregulating all new customer premise equipment, cellular mobile equipment has been considered customer premise equipment, offered on an unbundled, detariffed basis.<sup>45</sup> This order

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<sup>42</sup> *Id.* at n.52.

<sup>43</sup> *Twelfth Report and Order* at ¶ 61.

<sup>44</sup> *Bundling of Cellular Customer Premises Equipment and Cellular Service*, CC Docket 91-34, 7 FCC Rcd. 4028, 1992 WL 689944 (June 10, 1992).

<sup>45</sup> *Id.* at ¶ 3.

in turn relies on the Commission's *Cellular Communications System* orders,<sup>46</sup> holding that cellular mobile handsets should be treated no differently than landline CPE and requiring cellular CPE to be offered separate and apart from the cellular common carrier service. While unbundling of cellular CPE is no longer required, such equipment remains deregulated and outside the scope of Title II regulation. Likewise, the satellite customer equipment DTS provides is outside the scope of Title II regulation.

The *Tribal Lands* Order also cites earlier orders that conclude that the provision of CPE is not "common carriage." In 1980, in its *Computer II* Order,<sup>47</sup> the Commission separated CPE from network facilities and deregulated it. The Commission found that CPE is not "communications common carriage," and is severable from transmission service, stating: "We conclude that CPE is a severable commodity from the provision of transmission services and that regulation of CPE under Title II is not required and is no longer warranted."<sup>48</sup> Similarly, because DTS's provision of the satellite customer equipment at issue here is not "common carriage," the provision of such equipment is properly excluded from universal service support.

The *Computer II* Order, finding that the provision of CPE can be severed from transmission services and subsequently deregulating CPE for this reason, also supports the exclusion of satellite CPE from universal service support:

We find that CPE is a severable commodity from the provision of transmission services. The current regulatory scheme which allows for the provision of CPE in conjunction with regulated communication services

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<sup>46</sup> *Cellular Communications System*, 86 FCC 2d 469, 497-98 (1981) ("*Cellular Report and Order*"), recon. 89 FCC 2d 58, 83 ("*Reconsideration Order*"), further modified, 90 FCC 2d 571 (1982), appeal dismissed sub nom. *United States v. FCC*, No. 82-1526 (D.C. Cir. 1983).

<sup>47</sup> *In re Amendment of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384, aff'd sub nom, 693 F. 2d 198 (D.C. 1982), cert. denied, 461 U.S. 938 (1983) ("*Computer II*").

<sup>48</sup> *Id.* at ¶ 9.

does not reflect its severability from transmission services, or the competitive realities of the marketplace.

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Accordingly, we conclude that regulation of carrier-provided CPE under Title II of the Communications Act is no longer warranted.<sup>49</sup>

Because the Act does not regulate the provision of satellite CPE as a Title II service, it is illogical to support the provision of such equipment through high cost universal service mechanisms designed for the support of common carrier network facilities. As the *Computer II* Order notes, when CPE ceased to be a regulated service, it ceased to be any part of the transmission services. Consequently, DTS's provision of mobile satellite handsets and roof-top antennas does not qualify it as a facility-based provider of a supported service. The provision of such equipment is not a common carrier service, nor any part of the common carrier telecommunications network.

Because CPE is not a part of a supported service, CPE costs are not included in the costs supported through universal service funding, at either the state or federal level. CPE costs were removed from all regulated accounts nearly two decades ago and are not within the model costs which developed federal high cost per-line support. In like manner, inside wiring costs have been removed from regulated accounts.<sup>50</sup> Inside wiring is provided on a deregulated basis, outside of state or federal universal service support mechanisms.

In *Computer II*, the FCC also rejected the argument that the telephone handset is an indispensable part of the carrier's complete telephone service, stating: "There is nothing inherent in any carrier-provided CPE, including the basic telephone, that necessitates its provision as an

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<sup>49</sup> *Computer II* at ¶¶ 159-161.

<sup>50</sup> *Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network and Petition for Modification of Section 68.213 of the Commission's Rules Filed by the Electronics Industries Association*, Third Report and Order, CC Docket No. 88-57, 15 FCC Rcd 927 (2000) ("*Inside Wiring Order*").



integrated part of a carrier's regulated transmission service."<sup>51</sup> In support, the FCC cited its decision in *Implications of the Telephone Industry's Primary Instrument Concept (PIC)*, 68 FCC 2d 1157 (1978): "While in some sense a service may be incomplete without some kind of terminal equipment, '[o]ther basic utility services, such as electricity and gas, are similarly incomplete until connected to some device such as a light bulb or gas furnace which is necessary to make the service useful.'" For the same reason, mobile satellite service handsets and fixed satellite service customer antennas are not an integral part of the transmission or routing of the associated satellite service.

Satellite service handsets and antennas are available on a non-common carrier basis from any number of vendors.<sup>52</sup> Like other wireless equipment, satellite customer equipment is sold by a variety of vendors in conjunction with the satellite service chosen by the customer. Such equipment cannot be considered "network transmission and routing" of a supported service when it is commonly supplied to the customer by vendors who are not common carriers.

The PUCT's determination that DTS is eligible for high cost universal service support as a facility-based provider of satellite service cannot be reconciled with the Commission's decisions identified above. Under these orders, the mobile handset and fixed antenna used in connection with DTS's resold satellite service is CPE or the extension of facilities to initiate service, and separate and distinct from the satellite service itself. The satellite service is the only common carrier service being offered and the only service that qualifies as a supported service.

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<sup>51</sup> *Computer II* Order at ¶ 144 and n.50.

<sup>52</sup> These products are widely advertised for sale on the following websites: [www.satellitediscountstore.com](http://www.satellitediscountstore.com); [www.gmpcs-us.com](http://www.gmpcs-us.com); [www.allroadcommunications.com](http://www.allroadcommunications.com); [www.satellitophonestore.com](http://www.satellitophonestore.com); [www.satellitephonesdirect.com](http://www.satellitephonesdirect.com); [www.satellitephonesource.com](http://www.satellitephonesource.com); [www.mackaysatellite.com](http://www.mackaysatellite.com); [www.telestial.com](http://www.telestial.com); [www.wholesalesatellitedirect.com](http://www.wholesalesatellitedirect.com); [www.satphonestore.com](http://www.satphonestore.com); [www.globalcomsatphone.com](http://www.globalcomsatphone.com); [www.bluecosmo.com](http://www.bluecosmo.com); [www.gizmocafe.com](http://www.gizmocafe.com).

As to it, DTS is only a reseller, and owns none of the network transmission or routing facilities used in its provision.

Applying the proper standard, neither the mobile handset nor the fixed service antenna and associated wiring supplied by DTS constitute a supported service, nor is either a component of the transmission and routing of a supported service. Consequently, DTS is not eligible for high cost universal service support, as it does not own any transmission or routing facilities used to provide a supported service.

#### **IV. THE PUCT'S ORDER MUST BE PREEMPTED**

For these reasons, the PUCT's order designating DTS as eligible for federal high cost universal service support violates Section 214(e) of the Act and the above decisions of the FCC limiting federal high cost universal service support to carriers owning network facilities for the transmission and routing of a supported service. The only supported service DTS provides is resold satellite service. The Act, the FCC orders, the Universal Service Order, and the Commission's rules preclude designation of resale carriers as eligible telecommunications carriers for universal service funds. The PUCT's order, therefore, must be preempted.

By designating a resale carrier as eligible for universal service funds, the PUCT order violates Section 214(e) of the Act, the Universal Service Order, and rules limiting high cost funding to network transmission and routing costs. Such order is also anti-competitive as it permits a carrier to obtain high cost universal service funds to recover its CPE costs when no other carrier can obtain high cost universal service support for their CPE equipment.

Petitioners note that according to USAC's recent filing with the Commission, DTS is projected to receive \$4,683 in rural areas and \$5,718 in non-rural areas per quarter in federal high cost support in the state of Texas. Accordingly, Petitioners ask the Commission to consider

this Petition on an expedited basis and to suspend any high cost support payments to DTS while it is pending.

V. CONCLUSION

Based on the foregoing, Petitioners respectfully request the Commission issue the following declarations:

- Mobile handsets and antennas used with mobile satellite service are not network transmission and routing facilities eligible for high cost universal service support as defined by Section 214(e) of the Act.
- Rooftop or pole-mounted antennas and the associated wiring used with fixed satellite service are not network transmission and routing facilities eligible for high cost universal service support.
- The PUCT order designating DialToneServices, L.P, as eligible for high cost universal service support on the basis of its provision of satellite customer equipment violates Section 214(e) of the Act, the Universal Service Order, and the Commission's rules and is therefore preempted.

Respectfully submitted,

ALENCO COMMUNICATIONS, INC.,  
BIG BEND TELEPHONE COMPANY, INC.,  
DELL TELEPHONE COOPERATIVE, INC.,  
RIVIERA TELEPHONE COMPANY, INC.,  
VALLEY TELEPHONE COOPERATIVE, INC.,  
TEXAS STATEWIDE TELEPHONE  
COOPERATIVE, INC., AND TEXAS  
TELEPHONE ASSOCIATION

By: 

Benjamin H. Dickens, Jr.  
Mary J. Sisak  
BLOOSTON, MORDKOFKY, DICKENS,  
DUFFY & PRENDERGAST, LLP  
2120 L Street, NW, Suite 300  
Washington, D.C. 20037  
Tel: (202) 659-0830  
Fax: (202) 828-5568

McGINNIS, LOCHRIDGE & KILGORE, L.L.P.  
Brook Bennett Brown  
600 Congress Avenue, Suite 2100  
Austin, Texas 78701  
Tel: (512) 495-6023  
Fax: (512) 505-6323

ATTORNEYS FOR PETITIONERS

## CERTIFICATE OF SERVICE

*I, Kelly Laraia, hereby certify that I have on this 5<sup>th</sup> day of March, 2007, had copies of the foregoing delivered to the following, via First Class U.S. mail.*

Paul Hudson  
Julie Parsley  
Barry T. Smitherman  
Public Utility Commission of Texas  
1701 North Congress Avenue  
Austin, Texas 78711

  
Kelly Laraia